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IN THE

Supreme Court of the United States

DELBERT WILLIAMSON, *et al.*,

Petitioners,

v.

MAZDA MOTOR CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION THREE

BRIEF IN OPPOSITION FOR RESPONDENTS MAZDA MOTOR CORPORATION AND MAZDA MOTOR OF AMERICA, INC. DBA MAZDA NORTH AMERICAN OPERATIONS

DAVID R. KELLY
BOWMAN AND BROOKE LLP
150 South 5th Street
Suite 3000
Minneapolis, MN 55402
Telephone: (612) 339-8682
Facsimile: (612) 672-3200

MARK V. BERRY
Counsel of Record
BRIAN TAKAHASHI
ROBERT S. ROBINSON
BOWMAN AND BROOKE LLP
879 West 190th Street
Suite 700
Gardena, CA 90248
Telephone: (310) 768-3068
Facsimile: (310) 719-1019

Counsel for Respondents
Mazda Motor Corporation and
Mazda Motor of America, Inc.
dba Mazda North American Operations

223902

COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether Petitioners have presented compelling reasons to grant the Petition, when the lower court's decision finding preemption under *Geier v. American Honda* does not conflict with this Court's interpretation of *Geier* in a variety of cases involving regulations other than just the 1984 version of FMVSS 208, and when Petitioners have not shown any conflicting lower court decisions concerning claims similar to the Petitioners'?

2. Whether Petitioners have presented compelling reasons to grant the Petition, when the lower court examined the regulatory history of FMVSS 208, and found that, in contrast to the Coast Guard's refusal to promulgate propeller guard regulations in *Sprietsma v. Mercury Marine*, NHTSA's rule giving automobile manufacturers a choice of rear center seat safety belt options was part of a comprehensive regulatory scheme encompassing an authoritative expression of agency policy?

3. Whether Petitioners have presented compelling reasons to grant the Petition, when the lower court's holding dismissing Petitioners' failure to warn claim was based on Petitioners' waiver of that claim, and alternatively, upon the FMVSS 208 regulatory scheme that this Court found in *Wyeth v. Levine* was dramatically more comprehensive than the Federal Food, Drug, and Cosmetic Act regulation at issue there?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Mazda Motor of America, Inc. dba Mazda North American Operations is the entity which distributed the 1993 Mazda MPV minivan at issue in this case.

Mazda Motor Corporation is the entity which manufactured the 1993 Mazda MPV, and it is the parent of Mazda Motor of America, Inc.

Ford Motor Company is the only publicly held company that owns 10% or more of the issued stock of Mazda Motor Corporation.

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INTRODUCTION

Petitioners have wholly failed in their burden to present "compelling reasons" why their Petition for a Writ of *Certiorari* should be granted ("Petition"). *See* SUP. CT. R. 10. No conflict exists to justify a grant of *certiorari*.

The lower court correctly held that FMVSS 208 and the principles of *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861 (2000) preempted Petitioners' claim that Respondent Mazda Motor Corporation (MC) chose wrongly when, in accord with the options afforded under NHTSA's comprehensive regulatory scheme, it equipped the rear center or "inboard" seats of Petitioners' MPV minivan with a lap belt (a "Type 1" belt) instead of a lap/shoulder belt ("Type 2").

Petitioners' argument starts with the assertion that the California Court of Appeal too broadly interpreted this Court's decision in *Geier* and that such an interpretation conflicts with other decisions. Petitioners rest their argument about *Geier* on two points: 1) *Geier* is limited to cases involving passive restraint systems and the 1984 version of Federal Motor Vehicle Safety Standard 208 (FMVSS 208), and 2) that any court's "options always preempt" view of *Geier*'s holding is in error. Petitioners' former point is inaccurate, and their latter point, even if correct, is inapplicable here.

As to the first point, Petitioners fail to cite any case holding that *Geier* is to be applied so restrictively. Moreover, Petitioners' argument is belied by numerous cases, including authorities they cited elsewhere with

approval: *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002) (concerning Coast Guard's decision not to promulgate propeller guard regulations), *Wyeth v. Levine*, 129 S. Ct. 1187 (2009) (labeling of a pharmaceutical), and *O'Hara v. General Motors Corp.*, 508 F.3d 753 (2007) (automotive window glazing standards under a different FMVSS). In each of those cases, rather than merely ignoring *Geier* as being limited to regulations under the 1984 version of FMVSS 208, this Court (*Sprietsma* and *Wyeth*) and the Fifth Circuit (*O'Hara*) undertook a detailed examination of *Geier*.

Petitioners also decry those courts holding that, under *Geier*, whenever a federal agency grants options for compliance, a suit alleging that the defendant chose the "wrong option" is preempted. Petitioners fail to identify which courts they believe have taken this approach rather than determining whether the options were provided to further agency policy goals. Regardless of whether Petitioners are correct – that an "options always preempt" standard is too broad – it is clear that the California Court of Appeal in fact did undertake an extensive examination of the history of FMVSS 208. Simply stated, this case is not the vehicle to challenge any perceived "options always preempt" standard.

And Petitioners also fail to show the existence of any "wrong option" cases, involving the use of lap or lap/shoulder belts, that conflict with the lower court's decision. Indeed, the cases Petitioners cited all found the "wrong option" claim was preempted.

Petitioners next argue that the lower court failed to properly apply *Sprietsma* because it relied on federal appellate authorities that allegedly limited *Sprietsma* to those circumstances where there was a complete agency failure to act. But here, the lower court did in fact examine the lengthy history of FMVSS 208's rear seat safety belt options, and did not blindly follow those authorities. As shown below, that history includes NHTSA's initial proposal to remove the seat belt options for rear seats, and then a considered decision, including several safety concerns, to retain those options for certain seats, including the one occupied by the Petitioners' decedent. NHTSA's rulemaking most certainly conveyed an authoritative policy decision. The lower court's decision was thus perfectly consistent with *Sprietsma*.

To the extent that Petitioners assert that there exists a conflict between the Fifth Circuit's decision in *O'Hara* and that same circuit's later decision in *Carden v. General Motors Corp.*, 509 F.3d 327 (5th Cir. 2007), concerning the application of *Sprietsma*, that conflict is inadequate to support a grant of *certiorari*. First, of course, neither of those decisions is the one rendered below. And second, certiorari is not the method for resolving intra-circuit conflicts. *Wisniewski v. United States*, 353 U.S. 901, 902 (1957).

Petitioners' third and final argument is that this Court's recent decision in *Wyeth* shows their failure to warn claim was improperly dismissed. The unique history of this matter, however, militates against granting *certiorari* on this ground, since the lower court found that Petitioners had waived that theory of

recovery when they repeatedly alleged that it was inextricably linked to their preempted products liability claims.

Even ignoring that waiver, however, Petitioners' invocation of *Wyeth* cannot revive their failure to warn claim. *Wyeth* is founded upon a rejection of the plaintiff's attempt to analogize FMVSS 208 and the enforcement of regulations under the Federal Food, Drug, and Cosmetic Act. But as even the *Wyeth* court itself noted in refusing to hold that *Geier* preempted Wyeth's claim, there is a dramatic difference between the comprehensive FMVSS 208 regulations having the force of law relied upon by *Geier* and the long-standing co-existence of federal and state regulations under the FDCA.

Petitioners simply have failed to show the requisite conflict, or the need to settle any important federal question, to justify a grant of *certiorari*.

STATEMENT OF THE CASE

I. PLEADINGS IN THE STATE TRIAL COURT: PETITIONERS ALLEGE MAZDA MOTOR CORPORATION CHOSE THE WRONG OPTION OF THE TWO REAR CENTER SEAT SAFETY BELT OPTIONS PROVIDED BY NHTSA

On June 7, 2004, Petitioners and Utah residents Delbert Williamson, Alexa Williamson, through her guardian *ad litem*, Delbert Williamson, and the estate of Thanh Williamson filed their "Complaint for Personal Injury and Product Liability and for Wrongful Death

and for Exemplary Damages" in Orange County Superior Court alleging that on or about August 14, 2002, they were all riding in a 1993 Mazda MPV minivan on State Route 89 in Utah when they were struck by a 1998 Jeep Wrangler that became detached from a motor home towing the Jeep. (AA 1-6).[1]

Plaintiffs alleged that Thanh Williamson was "riding in the middle row center seat" and "was wearing a lap belt only . . . ." (AA 2:28 - 3:1-5). Petitioners claimed that Thanh Williamson would have survived the collision but for defects which included the "lap only seat belt" in her seat position. (AA 4:26-28). Petitioners elaborated on their lap belt only claims in their first amended complaint for strict liability, negligence, intentional misrepresentation and concealment, and wrongful death and alleged there that "when the force that was generated by this collision caused her body to 'jackknife' around her defective lap belt, causing severe abdominal injuries and internal bleeding." (AA 8:7-9). The basis of liability was described as the MPV minivan being "equipped with inferior and unsafe two-point lap belts in the middle sitting positions, when it should reasonably have been equipped with three-point seat belts, as the remaining seats in the SUBJECT VEHICLE." (AA 11:1-3). Petitioners also made a specific failure to warn claim about the lap-only belt, asserting that "Mazda had knowledge . . . of the dangers of two-point lap belts and failed to warn PLAINTIFFS and other consumers of such dangers." (AA 11:14-16). These claims were repeated in a second amended complaint to

[1] As in the Petition, "AA" refers to the Appellants' Appendix presented to the California Court of Appeal.

which defendant MC moved for judgment on the pleadings, arguing, *inter alia*, that the Petitioners' lap-only belt claims were preempted under the Supremacy Clause and the United States Supreme Court decision in *Geier*, 529 U.S. 861. (AA 55-69).

Petitioners opposed the motion for judgment on the pleadings on June 22, 2006, summarizing their argument as follows:

> With this motion, MAZDA is attempting to avoid liability for its failure to install three point lap/shoulder belts in the rear center seat of its MPV minivan, *even though it knew three point belts were the safest form of seat belt technology*, simply because it complied with a *minimum* federal standard that gave car makers the *option* of installing either lap/shoulder belts or lap-only belts in that sitting position. There was no support for this proposition in either California law or the United Stated Supreme Court's decision in *Geier*.

(AA 118:13-18).

At the hearing, the trial court stated that it would "separate out the jack-knife, we will call it, aspect of the – of liability" and granted the demurrer on that point. (RT 8:11-14).[2] The Court did, however, give Petitioners leave to file a third amended complaint "just more or

[2] "RT" refers to the Reporter's Transcript on Appeal, part of the record before the California Court of Appeal.

less flushing out the idea that there were other simultaneously – simultaneous causes or basis of liability to the decedent's death." (RT 9:19 – 24). That third amended complaint, instead of "flushing out the other theories of liability," contained 17 additional paragraphs of history and argument about FMVSS 208 and *Geier* and the same allegation that the vehicle was defective because, among other reasons, it had a "lap-only belt." (AA 289).

In response to the third amended complaint, including the 17 additional paragraphs concerning the already barred lap-only belt claims, the Respondents again demurred because: a) the trial court had already determined that any defect claim based upon use of a two-point safety belt instead of a three-point belt was preempted, b) a failure to warn claim cannot be based upon a preempted claim, and c) Petitioners admitted that their entire complaint, including their failure to warn claim, was based at least in part on the MC's use of a two-point safety belt. Petitioners' combined opposition asserted that they had avoided the bar of the trial court's prior ruling since their new defect claims allegedly did "*not rest on Mazda's failure to utilize the lap/shoulder seat belt . . . .*" (AA 380:19-21) (Emphasis in original).

At oral argument, Petitioners' counsel candidly admitted that if he could "not refer to the three-point versus two point belt [claim]," he would be unable to present a case and the court "might as will give a nonsuit." (RT 25). The trial court sustained the demurrers and dismissed all of Petitioners' claims arising out of the death of Thanh Williamson without leave to

amend. (AA 531-532). Then the trial court issued an amended order sustaining the demurrers, without leave to amend, to all of the Petitioners' claims arising out of the death of Thanh Williamson. Thereafter, pursuant to the parties' stipulation, the claims arising out of the Petitioners' own personal injuries were dismissed, and judgment was entered in the Respondents' favor on plaintiffs' claims arising out of the death of Thanh Williamson. (AA 558-559).

II. THE CALIFORNIA COURT OF APPEAL FINDS CONFLICT PREEMPTION UNDER *GEIER*

Petitioners appealed the judgment to the California Court of Appeal, asserting that the trial court and other appellate courts had interpreted *Geier*, 509 U.S. 861, too broadly and had failed to account for *Sprietsma*'s alleged holding that there can be no authoritative agency policy behind a decision not to make a regulation.

The California Court of Appeal affirmed the trial court's decision after examining *Geier* and the rulemaking history therein chronicled as well as the rulemaking history as applied to safety belt options for rear inboard seats such as Thanh Williamson's. *Williamson v. Mazda Motor America, Inc.*, 167 Cal.App.4th 905; Pet. App. at 1. *Geier*, it found, was not to be narrowly applied merely to passive restraint cases. *Id.*; Pet. App. at 17 - 18. Under *Geier*, NHTSA's rulemaking history revealed a combination of safety reasons for requiring in 1989 that rear outboard seats have Type 2 belts, but that manufacturers should have the option of installing Type 1 or Type 2 belts in rear *inboard* seating positions. *Id.*; Pet. App. at 16 -17.

As such, imposing liability on Respondents because the MPV had the Type 1 belts – *i.e.*, that Respondents had chosen the wrong option – would conflict with NHTSA's policy and thus was preempted. *Id.*; Pet. App. at 14-18.

Petitioners sought a rehearing because, they asserted, they had erroneously referred to Thanh Williamson's seating position as a "center" or "middle" seat instead of an "aisle" seat. Indeed, from the initial complaint to their opening brief on appeal, Petitioners had used the terms "center" and "middle" to describe that seat. In their Answer, Respondents noted that NHTSA provided a definition of "outboard" and that other seats were "center," "middle," or "inboard" seats. Since Thanh Williamson's seat did not fit the definition of an outboard seat under 49 CFR 571.3, it was an "inboard" rear seat, *See, e.g.*, 69 Fed. Reg. 70,904 *et seq.*, and thus not subject to the Type 2 belt requirements when the MPV was manufactured. The Court of Appeal denied rehearing, but modified its opinion to change certain references from "center" seats to "inboard" seats. (Pet. App. at 28-30).

III. THE CONSTITUTIONAL PROVISIONS AND REGULATORY STANDARDS SHOWING THAT PETITIONERS' CLAIMS WERE PREEMPTED

A. Constitutional Issues

Article VI of the United States Constitution provides that the laws of the United States "shall be the Supreme Law of the land, . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. Under the Supremacy Clause, any state law that conflicts with federal law is "without effect." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). This includes

common law liability, which may create just as much conflict with federal law as other types of state law. *Pokorny v. Ford Motor Co.*, 902 F.2d 1116, 1122 (3d Cir. 1990). It is also well-established that federal regulations have no less preemptive effect than federal statutes. *Hillsborough County v. Automated Medical Lab., Inc.*, 471 U.S. 707, 713 (1985).

"Pre-emption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *FMC Corp. v. Holliday* 498 U.S. 52, 56-57 (1990) (citations and quotations omitted). In the absence of express preemption, implied preemption may exist in the form of field or conflict preemption. Conflict preemption will be found where it is "impossible for a private party to comply with both state and federal requirements" or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Freightliner Corp. v. Myrick* (1995) 514 U.S. 280, 287 (1995).

B. For 42 Years, FMVSS 208 Has Provided A Comprehensive Framework For Motor Vehicle Passenger Restraints

The general history of FMVSS 208, entitled Occupant Crash Protection, began in 1967, when the Department of Transportation (DOT) required manufacturers to "install manual seat belts in all automobiles," pursuant to the National Traffic and Motor Vehicle Safety Act of 1966 (Safety Act). 15 U.S.C. §§ 1381, *et seq.*; *Motor Vehicle Mfrs. Assn of United*

States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 34-38 (1983). In its original form, FMVSS 208 required manufacturers to install combination lap/shoulder (Type 2 or "three-point") seat belt assemblies in the driver and right front passenger designated seating positions. For every other seating position, it allowed manufacturers to either lap-only (Type 1 or "two-point") or the lap/shoulder seat belt assemblies. *See* 32 Fed. Reg. 2408, 2415 (Feb. 3, 1967) (RJN 18, 25).[3]

Over the 42-year history of FMVSS 208, NHTSA has reviewed, amended, and chosen not to amend the standard on multiple occasions. This review has included instances where the public has petitioned to seek a change in the standard. *See, e.g.*, 49 Fed. Reg. 15,241 (Apr. 18, 1984) (NHTSA denial of petition by Kathleen Weber and John W. Melvin to require Type 2 belts in all outboard rear seating positions) (AA 107 – 110)). It has included NHTSA's exercise of its own self initiative to revisit the standard. *See, e.g.*, 44 Fed. Reg. 77,210 (Dec. 31, 1979) (NHTSA proposed amendment of FMVSS 208 to improve seat belt comfort and convenience) (RJN 52-65). And it has included NHTSA's amendment of the standard when directed by Congress. *See, e.g.*, 68 Fed. Reg. 46,546 (Aug. 6, 2003) (NHTSA's proposed rulemaking to require Type 2 belts in all rear seating positions following passage of "Anton's Law") (AA 92 – 105).

The evolution of FMVSS 208 has occurred in stages. The initial discussion related primarily to increasing seat

3. "RJN" referes to the Respondents' Request for Judicial Notice, part of the record in the Court of Appeal below.

belt usage[4] and improving safety for the driver and other front seat occupants. Ultimately, this discussion led to the installation of alternative passive restraint systems[5]

[4] NHTSA had long been on record expressing its concern that mandatory installation of lap/shoulder belts in place of lap only belts would decrease the number of people who actually wear their safety belts. 35 Fed. Reg. 14,941, 14,942 (Sept. 25, 1970) (RJN 28). Convenience and comfort have been oft cited as factors which historically kept seat belt usage rates low. *See* 44 Fed. Reg. 77,210, 77,212 (Dec. 31, 1979) (RJN 54).

[5] When it became apparent that front seat occupants were not choosing to "buckle up," NHTSA "amended FMVSS 208 [in 1970] to include some passive protection requirements," including "airbags and automatic seatbelts." *Geier*, 529 U.S. at 874-875. Two years later, it "mandated full passive protection for all front seat occupants for vehicles manufactured after August 15, 1975." *Id.* Manufacturers were given the choice of continuing with passive restraints or using manual restraints coupled with an "ignition interlock device" that prevented the occupant from starting the car unless the seat belt was fastened. *Id.* A "continuous warning buzzer" was later added as an alternative to the ignition interlock. *Id.* But public outcry to these devices was so severe that Congress passed a law forbidding manufacturers to meet FMVSS 208 through these devices. *Id.*

In 1976, NHTSA "suspended the passive restraint requirements" in fear of public backlash, but they were reinstated in 1977 and amended to principally require either airbags or passive seat belts. *Id.* at 1923. These amendments were rescinded in 1981, but the Supreme Court held those rescissions unlawful. *See State Farm*, 463 U.S. 29.

In 1984, the DOT, led by then-Secretary Elizabeth Dole, amended FMVSS 208, so that it sought a mix of passive restraint

(Cont'd)

and the current requirement of airbags in the driver and right front passenger seating positions of all passenger cars today.[6]

The instant matter involves the particular discussion and changes regarding the rear occupant compartment. Providing auto manufacturers the option to install a Type 1 lap belt in the center rear or "inboard" seating positions was a carefully-weighed policy decision. It is evident from NHTSA's rulemaking process that FMVSS 208's allowance of a Type 1 lap belt in the rear inboard seat, in effect when the subject 1993 Mazda MPV was manufactured,[7] was part of a comprehensive

(Cont'd)

systems, including airbags, automatic belts, and other passive restraint devices. *Id.* at 1924. "The 1984 . . . standard also deliberately sought a gradual phase in of passive restraints." *Id.* at 1924. Therefore, the DOT only required "the manufacturers to equip . . . 10% of [the cars they]" manufactured after September 1, 1986, with passive restraints. *Id.*

[6] In 1993, NHTSA rescinded the automatic seat belt requirement and started the phase in of air bags. *See* 58 Fed. Reg. 46,551, 46,553 (1993).

[7] The version of 49 C.F.R. § 571.208, S4.2.2, in effect when the subject 1993 Mazda MPV was assembled, applied to: "[t]rucks and multipurpose passenger vehicles with a GVWR of 8,500 pounds or less and an unloaded vehicle weight of 5,500 pounds or less, manufactured on or after September 1, 1991 and before September 1, 1997." (RJN, no. 4). 49 C.F.R. § 571.208, S4.2.1.2 goes on to state that, "[e]xcept as provided in S4.2.4, each truck and multipurpose passenger vehicle . . . .

(Cont'd)

regulatory scheme, advancing deliberately chosen policy, and not just a minimum safety standard.

Of import to this case, the first significant discussion regarding the amendment of FMVSS 208 to mandate Type 2 lap/shoulder belts in the rear occupant compartment started in December of 1982 via a petition for rulemaking requesting that NHTSA require Type 2 lap/shoulder seatbelt assemblies in the rear outboard positions of all passenger vehicles. In 1984, the Secretary of Transportation, through NHTSA, rejected this petition, concluding that maintenance of the option to use Type 1 or Type 2 belts was integral to NHTSA's policy objectives. 49 Fed. Reg. 15,241 (Apr. 18, 1984) (AA 107 – 110).

From 1986 to 1989, NHTSA revisited FMVSS 208 when it considered proposed rulemaking to mandate lap/shoulder belts for the rear outboard seating positions of passenger cars, convertibles, light trucks and multipurpose passenger vehicles.[8] After receiving many

(Cont'd)
manufactured on or after September 1, 1991 and before September 1, 1997, shall meet the requirements of S4.1.2.1, or at the option of the manufacturer, S.4.1.2.2 or S.4.1.2.3 . . ." (RJN 4). Section 4.1.2.3.1(c) specifically provides that a Type 1 lap belt or a Type 2 lap/shoulder belt is allowed for each designated seating position other than the outboard designated seating position. (RJN 2). Together these sections expressly gave Mc the option to install a Type 1 lap belt assembly in the center positions of the 1993 Mazda MPV's rear rows.

[8] There were actually two separate amendments or steps to the final rule here. One required lap/shoulder belts in rear (Cont'd)

comments and studying the pros and cons of the proposed rule, NHTSA made a deliberate decision to continue to allow Type 1 lap belts in all rear row center seating positions. *See* 53 Fed. Reg. 47,982, 47,984-47,985 (Nov. 29, 1988) (AA 237 – 248); 54 Fed. Reg. 46257, 46258 (Nov. 2, 1989) (RJN 67 - 78).

In 1986, NHTSA received a petition seeking a requirement that all rear seating positions be equipped with Type 2 belts. *See*, history described in step 1 of final rulemaking, 54 Fed. Reg. 25,275 (AA 251). NHTSA granted the petition in 1987 and published an advanced notice of public rulemaking (ANPRM) seeking comments on June 16, 1987. *Id.* After receiving responses from 34 commenters, NHTSA preliminarily determined that Type 2 belts in certain rear seats would be justified, and published a notice of public rulemaking. *See id.; see also* 54 Fed. Reg. 479, NPRM). That NPRM, which NHTSA described as a "comprehensive proposal," is telling. *Id.*; 54 Fed. Reg. 25,275.

(Cont'd)

outboard seating positions in most passenger cars, but continued the option of providing lap belts or lap/shoulder belts for non-outboard positions, including the center rear seating position. *See* 54 Fed. Reg. 25,275 (June 14, 1989) (AA 250 – 255).

The other required lap/shoulder belts for rear outboard seating positions in other types of vehicles, including convertibles, light trucks, and multipurpose passenger vehicles, such as the 1993 Mazda MPV minivan at issue in this case. *See* 54 Fed. Reg. 46,257, 46,257, 46,258 (Nov. 2, 1989) (RJN 67 – 78).

In that NPRM, NHTSA noted the various comments it received expressing concern about requiring Type 2 belts in rear *inboard* seats like the one utilized by Thanh Williamson. Some of the comments were described as follows in the Federal Register:

> Toyota noted in its comments that rear seating positions that are not outboard seating positions are not presently required to even have anchorages for shoulder belts. Hence, according to this comment, structural changes to vehicles would be required. Both Toyota and Volkswagen noted that the rear center seating position is the least-used seating position in cars, according to the 19 city survey sponsored by NHTSA. The American Seat Belt Council stated in its comments that lap/shoulder belts in rear center seating positions had low cost-effectiveness and little field testing. The Automobile Importers of America and several manufacturers alleged that there would be difficulties in locating the anchorage for a rear center seat shoulder belt in vehicles other than passenger car sedans. According to these comments, hatchback or station wagon models of passenger cars and the other vehicle types mentioned in the ANPRM would have to locate anchorages for rear center seat shoulder belts either in the loadspace floor or on the vehicle roof. According to these commenters, these locations would result in disruptions of the vehicle's cargo carrying area or impede the driver's rearward vision.

> The agency has tentatively concluded that it should limit the proposed requirement for lap/shoulder belts in rear seats to outboard seating positions *only*. The agency agrees with those commenters that asserted that there would be more technical difficulties associated with a requirement to install lap/shoulder belts at all rear seating positions, than with a requirement to install lap/shoulder belts only at rear outboard seating positions. Whether or not those difficulties could be overcome, there would be small safety benefits and substantially greater costs if rear seating positions that are not outboard seating positions were required to have lap/shoulder belts.

AA 239 – 240, 53 Fed. Reg. 47,984.

Another comment, not specifically mentioned in the NPRM, was Mercedes-Benz's statement that, "[d]ue to the extremely low occupancy-rate of the rear-center seat by adults, plus an improved suitability for fastening child restraint systems, the rear-center seating positions are equipped with lap belts." *See* Comments of Mercedes-Benz of North America, Inc., docketed as NHTSA 87-08-NO1-021, at 1 (July 30, 1987).

Obviously, these varied concerns referenced in the NPRM included numerous safety-related issues. No matter how NHTSA later described the group of these concerns, including the term "technical difficulties," it is clear these issues influenced the final rule, the second part of which was issued on November

2, 1989, and resulted in NHTSA offering manufacturers a choice to use Type 1 or Type 2 belts in rear center or "inboard" seats. 54 Fed. Reg. 46,258. As NHTSA said:

> The agency explained in the NPRM that there are more technical difficulties associated with any requirement for lap/shoulder belts at center rear seating positions, and that lap/shoulder belts at center rear seating positions would yield small safety benefits and substantially greater costs, given the lower center seat occupancy rate and the more difficult engineering task. Accordingly, this rulemaking excluded further consideration of a requirement for center rear seating positions. None of the commenters presented any new data that would cause the agency to change its tentative conclusion on the subject that was announced in the NPRM.

Id.

Petitioners make much of the final rulemaking and NHTSA's use of the term "technical difficulties," implying that they do not encompass "safety" concerns. When viewed in context, showing that term was a short description of NHTSA's various concerns, including numerous safety concerns, it is clear that safety was one of the prime reasons why NHTSA chose to maintain the Type 1 or Type 2 option for rear center seats.

Even well after the 1989 rulemaking, and before the Mazda MPV was manufactured, NHTSA continued to discuss safety concerns about Type 2 belts in rear center

seats. *See, e.g.*, NHTSA, CHILD PASSENGER RESOURCE MANUAL 88 (Mar. 1992) (stating that the "center rear seating position," which almost always has a lap belt, "often has a belt that is tightened by hand and therefore usually poses fewer compatibility problems [for child restraints].").

There can be little doubt that, as part of its comprehensive scheme for regulating the types of safety belts used, NHTSA's decision to permit Type 1 or Type 2 belts for rear center or "inboard" seating position was a deliberate policy step made as part of NHTSA's implementation of the Safety Act and designed to promote safety.

REASONS FOR DENYING THE PETITION

I. PETITIONERS FAIL TO SHOW THE LOWER COURT'S APPLICATION OF *GEIER* TO PREEMPT THE "WRONG OPTION" CLAIM HERE CONFLICTS WITH THIS COURT'S VIEW OF *GEIER*, OR THE DECISIONS OF OTHER COURTS EVALUATING THE SAME "WRONG OPTION" CLAIM

A. Unlike Petitioners' Desired Interpretation, *Geier* is not to be Narrowly Applied

Petitioners commence their discussion with an apparent assertion that *Geier* is to be given a narrow application by the lower courts. They say it was "based solely" on the "unique" history of the 1984 passive restraint regulations under FMVSS 208 and as such, is inapplicable to this matter (or to any other case) that

does not involve the 1984 version of FMVSS 208. (Pet. at 9, 12-13).

This ultra-narrow interpretation of this Court's precedent urged by Petitioners is both lacking in support and, based upon the authorities even Petitioners cite elsewhere, illogical. As the California Supreme Court (citing this Court's decisions in *Sprietsma*, 537 U.S. 51 and *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001)) cogently explained two months' before Petitioners filed the underlying lawsuit, "*Geier* is not a narrow holding limited to automobile safety standards; instead it established a general rule upholding conflict preemption even if the applicable federal law contains a savings clause." *Dowhal v. SmithKline Beecham Consumer Healthcare*, 32 Cal.4th 910, 925-926 (2004) (citing *Spriestma* at 63 and *Buckman Co.* at 352).

Were *Geier* to be narrowly applied, its precedential value would be so limited that courts, including this Court, would expend little time exploring its relevance to cases involving medical devices, boat propellers, and automobile window glass. In those cases, the court could merely say that, since the 1984 version of FMVSS 208 is not being cited, *Geier* has no effect.

Of course, even authorities relied upon by Petitioners, such as *Sprietsma*, *Wyeth*, and *O'Hara*, all went through detailed analyses to differentiate their facts and regulations from *Geier*. Had this Court and the Fifth Circuit believed that *Geier* was a narrow holding, there would have been little need for such an evaluation. Instead, those decisions could have summarily disposed of *Geier* by holding that it applies only to the 1984 version of FMVSS 208.

B. As the Lower Court Undertook an Analysis of the Policy Reasons Behind the Safety Belt Options For Rear Inboard Seats, This Case is not the Proper Vehicle to Address the Alleged "Options Always Preempt" Standard

In addressing Petitioners' claims below and the Respondents' preemption defenses, the California Court of Appeal undertook a detailed examination of FMVSS 208 as it related to the rear inboard and outboard seating positions. (Pet. App. at 8 – 11). After that analysis, it then recited and examined the very portions of *Geier* urged as critical by Petitioners – the findings that the passive restraint regulations of FMVSS 208 embodied NHTSA's policy objectives. (Pet. App. at 12 – 15). Only then, after it separately reviewed the rear inboard regulatory history, and the mandates of *Geier*, did the California Court of Appeal find that certain federal decisions, such as *Carden v. General Motors Corp.*, 509 F.3d 227 (5th Cir. 2007) and *Roland v. General Motors Corp.*, 881 N.E.2d 722 (Ind. App. 2008), were persuasive. In other words, the lower court's opinion, far from showing an unquestioned allegiance to the federal court cases, expressed the court's own analysis as to why *Geier* applied and mandated that Petitioners' claims were preempted.

Against the backdrop of the California Court of Appeal's detailed analysis, Petitioners' second point in their Petition, that the "broad 'options always preempt' interpretation of *Geier* is directly contrary to the statutory scheme enacted by Congress," is curious. (Pet. at 14). By this point, Petitioners imply that the decision below is in fact an "options always preempt"

ruling, which it clearly is not. Also, Petitioners fail to specifically identify those cases that Petitioners assert were based on the "options always preempt" theory and deserve this Court's attention. (Pet. at 13 – 14). Petitioners merely ambiguously use "these cases" without identifying them.[9]

Ample evidence exists to show that NHTSA policy objectives permeated its rulemaking concerning belting options for rear inboard seats like those at issue on the subject Mazda MPV minivan. As such, this case is not one guided by a supposed "options always preempt" rule. Thus, even were there cases governed by such a rule, the instant case does not provide the appropriate vehicle to address those cases.

C. Petitioners Failed to Show any Conflict with Other Cases Finding Preemption of Rear Center Seat "Wrong Option" Claims

Although Petitioners claim that the interpretation of *Geier* conflicts with other courts, they failed to identify any courts that have decided the same issue – whether FMVSS 208 preempts rear center seat "wrong option" claims – that are in conflict.

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[9] Respondents suspect that Petitioners are referring at least to *Carden*. The *Carden* plaintiffs made the same assertion – that the appellate court relied merely on the option provided by the FMVSS and thus failed to do "the in-depth analysis" of FMVSS 208 – in their Petition for a Writ of *Certiorari* to this Court. (Docket No. 07-1302, p. 13). That petition was denied on June 9, 2008.

The two cases Petitioners do cite, *Chevere v. Hyundai Motor Co.*, 774 N.Y.S.2d 6 (2004) and *O'Hara*, 508 F.3d 753, are easily distinguishable. First, neither case involved the wrong option issue presented below, *to wit*, whether a manufacturer could be held liable for using Type 1 belts in a rear center seat instead of a Type 2 belt. As discussed more fully below, *O'Hara* involved automobile window glazing standards under FMVSS 205. *Chevere* involved a plaintiff's use of an automatic safety belt but not the available manual seat belt. Furthermore, as the lower court noted, the *Chevere* court refused to apply *Geier* on the strength of a pre-*Geier* decision involving a structural design flaw. Petitioners here have not made any such structural design flaw claim.

II. SINCE THE PREEMPTION DECISION BELOW RELIED ON A REGULATION THAT WAS PART OF A COMPREHENSIVE, AUTHORITATIVE AGENCY POLICY, THERE IS NO CONFLICT WITH *SPRIETSMA*

Attempting to manufacture a conflict where none exists, petitioners assert that "the California Court of Appeal followed a recent line of cases holding that *Sprietsma* is strictly limited to situations involving a 'complete absence of regulatory action.'" (Pet. at 20) (citing *Carden* and *Roland*). As the California Court of Appeal noted, however, the *Carden* court's application of *Sprietsma* was not so shallow, but was instead based upon a finding that the FMVSS 208 regulation before it

– unlike the Coast Guard's lack of regulation – was part of long-standing agency policy:

> As explained in *Carden*, "*Sprietsma* involved a complete absence of regulatory action, which was not the case here. As discussed above, the [NHTSA] identified particular policy reasons for its decision to allow manufacturers the option of selecting between the two seat belt designs, and included this option as a part of a comprehensive regulatory scheme. 509 F.3d at 232. Thus, *Sprietsma* does not control." *Id.* at 232; *see also Roland*, 881 N.E.2d at 728-729.

Williamson, 167 Cal.App.4th at 917, Pet. App.

Absence of regulatory action, then, seemingly signifies the absence of agency policy reasons for failing to issue propeller regulations in *Sprietsma*. As Petitioners admit, *Sprietsma* involved the lack of "any 'policy' judgment" by the Coast Guard on propeller guards. (Pet. at 19). In contrast, *Carden* correctly found and cited the policy reasons behind NHTSA's decision to permit Type 1 or Type 2 belts in rear center seats of multipurpose passenger vans.

In their *Sprietsma* analysis, Petitioners aver that NHTSA's decision concerning rear center seating positions was a mere "cost-benefit analysis." Petitioners must make this argument to promote a comparison to the facts of *Sprietsma*. But Petitioners' assertion that NHTSA's decision concerning rear center seat belts was

"indistinguishable from the Coast Guard's reasoning discussed in *Sprietsma*," *id.*, is not supported by the facts.

As shown above, NHTSA had a panoply of safety concerns underlying its policy to permit Type 1 belts in rear center seating positions. And the *Carden* and *Roland* courts each concluded that the "technical difficulties" cited by NHTSA (and quoted by Petitioners here) involved safety concerns, and not just a cost-benefit analysis.

These policy decisions and the history of FMVSS 208 show that neither *Altria v. Good*, 129 S. Ct. 538 (2008), nor *O'Hara*, 508 F.3d 753, invalidate the lower court's evaluation of *Sprietsma*, or that a different result is warranted. In *Good*, given minimal treatment by the Petitioners, this Court addressed a claim that certain cigarette manufacturers' sale of "light" cigarettes violated a state unfair practices act, and the manufacturers' defense that the claims were preempted by the Federal Cigarette Labeling and Advertising Act (FCLAA). In particular, the manufacturers asserted that "the FTC [Federal Trade Commission] has for decades promoted the development and consumption of low tar cigarettes and has encouraged consumers to rely on representations of tar and nicotine based on Cambridge Filter Method testing . . . ." *Good*, 129 S. Ct. at 549.

In rejecting the preemption defense, this Court noted that the FTC's enforcement of the FCLAA was not marked by any "longstanding policy authorizing collateral representations based on Cambridge Filter Method test results." *Id.* at 550. Indeed, the Court noted

that the FTC had sometimes "prevented misleading representations of Cambridge Filter Method test results." Then, before mentioning *Sprietsma* for the sole time in the majority opinion, this Court stated that any failure by the FTC to force correction of the representations re "light" cigarettes cannot be sufficient evidence of an agency policy to support preemption. Citing *Sprietsma*, and the Coast Guard's "decision not to regulate propeller guards," it held that "agency nonenforcement of a federal statute is not the same as a policy of approval." *Id.* at 550 (citing *Sprietsma*, 537 U.S. 51) (footnote omitted).

Although the *Good* court did not discuss *Geier* or FMVSS 208, the contrast between the comprehensive scheme in FMVSS 208 and the FCLAA is apparent.

In *O'Hara*, the specific distinction between FMVSS 208 and the regulation involved there was explored. O'Hara alleged that she was partially ejected from a vehicle during a low-speed rollover accident, and that she would not have been injured had the vehicle been equipped with window glass treated with advanced glazing instead of being tempered. *O'Hara*, 508 F.3d at 755. In its pre-emption analysis, the *O'Hara* court noted the sharp contrast between the safety standard before it, FMVSS 205, and the safety standard in *Geier* (and in this instant petition), FMVSS 208.

First, the Court looked at the text of FMVSS 205, and found that it was simple and straightforward. *Id.* at 759. Containing glazing and materials specifications, the *O'Hara* court described FMVSS 205 as a "materials standard that sets a safety 'floor' to ensure that the

glazing materials used by manufacturers meet certain basic requirements." *Id.* at 760. The *O'Hara* court then noted, in contrast, that FMVSS 208 contains detailed timelines and safety testing requirements and found that it had "carefully constructed safety restraint options." *Id. O'Hara* did not limit this evaluation to the airbag standards examined in *Geier*. In fact, it cited *Hurley v. Motor Coach Industries, Inc.*, 222 F.3d 377 (7th Cir. 2000) (finding pre-emption of a bus driver's claim that lap-only belt was defective), as another example involving implementation of NHTSA's carefully constructed safety plan. *Id.*

By contrast, the *O'Hara* court found that the FMVSS 205 standard lacked all the indicia, including "'options' language,'" of "federal policy." *Id.* Similarly, the Court found the commentary on FMVSS 205, especially when compared to FMVSS 208, to be wanting. The final commentary on the version of FMVSS 208 at issue in *Geier* was replete with agency policy and concerns; FMVSS 205, in contrast, failed entirely to "discuss NHTSA's rollover protection policies." *Id.* at 761.

Finally, the *O'Hara* court looked at NHTSA's "Notice of Withdrawal," whereby it announced an intention to refrain from any further rulemaking on advanced glazing. The *O'Hara* court summarized the Notice as emphasizing "the existence of other promising rollover protection technologies and NHTSA's need to devote resources to developing procedures to test them," and found that, it "'does not convey an authoritative message of a federal policy against' advanced glazing in side windows." *Id.* 763-764 (citing *Sprietsma* at 67).

In short, nothing in *Good* or *O'Hara* supports an assertion that the California Court of Appeal wrongly evaluated *Sprietsma* and the impact of FMVSS 208. NHTSA's comprehensive regulatory scheme, and the numerous policy reasons for maintaining the lap or lap/shoulder belt option at the time the MPV was manufactured 17 years ago, show that *Sprietsma* is not controlling.

III. THERE IS NO CONFLICT WITH *WYETH*, GIVEN THE COMPREHENSIVE REGULATORY SCHEME IN FMVSS 208, AND PETITIONERS' WAIVER BELOW OF THEIR FAILURE TO WARN CLAIMS

Petitioners assert that this Court's recent decision in *Wyeth v. Levine*, 129 S. Ct. 1187 (2009), confirms that Petitioners' failure to warn claims should not have been dismissed by the state Court of Appeal. Petitioners' argument is fatally flawed, for two distinct but equally powerful reasons.

First, further showing why this case is not appropriate for this Court's review, the Petitioners waived the failure to warn claims. (Pet. App. 25-26). Petitioners admitted twice that, with the trial court's finding that the product liability claims were preempted, "they could not proceed on the remaining theories of liability." (Pet. App. at 25). These theories included a failure to warn claim. *Id.* at 26 (citing *Carden*, 509 F3d at 233).

Second, *Wyeth* concerned an FDCA regulation with a factual and regulatory history wholly distinct in character from the FMVSS 208 regulation construed in *Geier*. *Wyeth*, 129 S. Ct. at 1203. In contrast to the situation in *Geier*, the *Wyeth* court noted that, in reviewing the FDCA, it had "no occasion . . . to consider the pre-emptive effect of a specific agency regulation bearing the force of law." 129 S. Ct. at 1203.

No similar deficiency marked the regulation than California Court of Appeal evaluated here. As in *Geier*, the lower court, and the various other courts deciding similar cases, had the benefit of the complex FMVSS 208 regulatory scheme concerning rear center seat belt options. That scheme is radically different than the one presented in *Wyeth*. *Wyeth* simply is inapplicable.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of *Certiorari* should be denied.

Respectfully submitted,

DAVID R. KELLY
BOWMAN AND BROOKE LLP
150 South 5th Street
Suite 3000
Minneapolis, MN 55402
Telephone: (612) 339-8682
Facsimile: (612) 672-3200

MARK V. BERRY
Counsel of Record
BRIAN TAKAHASHI
ROBERT S. ROBINSON
BOWMAN AND BROOKE LLP
879 West 190th Street
Suite 700
Gardena, CA 90248
Telephone: (310) 768-3068
Facsimile: (310) 719-1019

Counsel for Respondents
Mazda Motor Corporation and
Mazda Motor of America, Inc.
dba Mazda North American Operations